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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	:	SIERRA CLUB'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF ITS MOTION TO AMEND THE REQUEST FOR AGENCY ACTION

The Utah Chapter of the Sierra Club (Sierra Club) respectfully submits this Reply Memorandum in further support of its Motion for Summary Judgment and of its Motion to Amend the Request for Agency Action. The Sierra Club moved for summary judgment on Statement of Reasons # 10 in its First Amended Request for Agency Action, anticipating that the Board would grant the pending request for leave to amend. The Division of Air Quality and the Executive Secretary (collectively "DAQ") have presented a document with their opposition brief, not previously made part of the Administrative Record and not made available publicly or to the Sierra Club, which bears on the Sierra Club's motions for leave to amend and for summary judgment on Statement of Reasons # 10. Yet, despite this submission, no material issue of fact remains regarding the Executive Secretary's failure to affirmatively approve the extension of the October 12,

2004 Approval Order (AO) for the proposed SPC power plant. Neither DAQ nor SPC have submitted any evidence that the Executive Secretary approved the extension. Because the Sierra Club's claim in Statement of Reasons # 10 is justified by the facts, and because the Sierra Club's motion for leave to amend the request for agency action was timely under the applicable legal standards, the Sierra Club requests that the Board grant the Sierra Club leave to amend its request for agency action. In addition, because the Executive Secretary did not affirmatively approve the extension of SPC's AO, the Board should grant the Sierra Club's motion for summary judgment on the claim in Statement of Reasons # 10.

Standard of Review

When a party moves for summary judgment, the party opposing the summary judgment "may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response." Utah R. Civ. P. 56(e). In this case, the DAQ submitted a single document, previously undisclosed to the public, showing that SPC applied to DAQ for an extension of the 18-month review period required under the regulations and in the AO. However, neither DAQ nor SPC have submitted any evidence to show that the Executive Secretary evaluated, or actually approved, the requested extension. Based on the undisputed fact that the Executive Secretary never made a determination whether the extension was justified, the Board should grant Sierra Club's motion to amend the request for agency action and also grant summary judgment in favor of the Sierra Club on this claim.

I. The Board Should Grant the Sierra Club's Motion for Leave to Amend its Request For Agency Action.

The Sierra Club submitted its Statement of Reason # 10, arguing that the Executive Secretary improperly failed to conduct the required 18-month review of the AO for the proposed plant, and that the AO had expired by operation of law, based on what the DAQ now asserts was only the "preliminary" Administrative Record distributed by the Executive Secretary on February 15, 2007. DAQ now supplies a document showing that SPC applied for an extension to the AO based on Condition 9 of the AO on November 17, 2005. The omission of SPC's letter from the preliminary record underscores the importance of a full and fair discovery process to ensure that the Board has all the relevant facts available when it hears the merits of these claims. Notwithstanding this omission, the Board should grant the Sierra Club's motion for leave to amend its request for agency action and add the claim in Statement of Reason # 10, because the factual basis for Sierra Club's claim that the Executive Secretary made no determination regarding a revocation of the AO, nor whether an extension of the AO was justified, remains unchallenged.

There can be no serious argument that Sierra Club's motion for leave to amend its request for agency action was untimely. The information that DAQ now attaches to its brief was never made available to the general public, and DAQ did not include it in the "preliminary" Administrative Record, although it is clearly relevant to the continued validity of the AO for purposes of these proceedings. At the time of SPC's submission to DAQ (November 17, 2005), Sierra Club was barred from participating in proceedings before the Board for lack of standing. Thus, it was perfectly reasonable for the Sierra Club to wait for the Supreme Court's decision reinstating it in these proceedings, and the

subsequent production of the administrative record, before moving for leave to amend. Kelly v. Hard Money Funding, Inc., 2004 UT App 44, ¶ 38, 87 P.3d 734 (holding that a party is fully justified in waiting to move to amend until reliable confirmation of the facts can be obtained). The very purpose of the discovery process in an administrative proceeding is for parties to obtain information that has otherwise been unavailable, to allow the Board "to obtain full disclosure of relevant facts" and "to afford all the parties reasonable opportunity to present their positions," as required by the Utah Administrative Procedures Act. Utah Code Ann. § 63-46b-8(1)(a).

The Utah Supreme Court has endorsed allowing amendments to pleadings as late as four weeks before trial, after more than twenty months of discovery and an additional three months of pre-trial preparation. Savage v. Utah Youth Village, 2004 UT 102, ¶¶ 5-10, 104 P.3d 1242, 1245-46. Given that the parties have barely begun the discovery process, and the hearing on the merits is many months off, DAQ and SPC cannot credibly argue that they would be prejudiced by the addition of a claim, or that the proposed amendment was in any way untimely. See Pett v. Autoliv ASP, Inc., 2005 UT 2, ¶ 6, 106 P.3d 705, 706-07 (holding that amendments to pleadings are appropriate to allow examination of all issues in a case, so long as the other parties have a "reasonable time" to respond to the newly-added issues).

Now DAQ has submitted the letter showing that SPC requested an extension of the 18-month review period. DAQ SPC Brief, Exhibit B. However, neither DAQ nor SPC have submitted any evidence to counter Sierra Club's statement of undisputed fact Number 4 – that "the Executive Secretary made no determination regarding a revocation of the AO, nor whether an extension of the AO was justified." Sierra Club Motion for

Summary Judgment at 6. Because the new claim in Statement of Reasons # 10 in Sierra Club's motion for leave to amend is factually justified, because that motion is timely filed, and because DAQ and SPC have not shown that they would be prejudiced by addition of this claim, the Board should grant Sierra Club's motion for leave to amend.

II. The Board Should Grant the Sierra Club's Motion for Summary Judgment.

A party opposing a motion for summary judgment must supply evidence to show that there is a disputed issue of material fact remaining for trial – if a party only relies on "mere allegations or denials of the pleadings," summary judgment against that party is appropriate. Grand County v. Rogers, 2002 UT 25, ¶ 21, 44 P.3d 734. Here, DAQ and SPC have not presented evidence to controvert the undisputed fact that "the Executive Secretary made no determination regarding a revocation of the AO, nor whether an extension of the AO was justified." Sierra Club Motion for Summary Judgment at 6. The Executive Secretary only alleges that this is wrong – but does not attach any actual evidence to show that the Executive Secretary did make a determination, or did justify that decision. DAQ SPC Brief at 5-6. Accordingly, it is undisputed that the Executive Secretary did not make the necessary determination. Because SPC had an obligation to obtain affirmative approval of the extension from the Executive Secretary, and because the Executive Secretary failed to comply with his express obligation to evaluate the status of the project after 18 months, the SPC AO is void and should be remanded to the DAQ.

Under the Utah air quality regulations, "[a]pproval orders issued by the executive secretary in accordance with the provisions of R307-401 shall be reviewed eighteen months after the date of issuance to determine the status of construction …. If a continuous program of construction … is not proceeding, the executive secretary may

revoke the approval order." Utah Admin. Code R307-401-18 (emphasis added). Because DAQ has provided no evidence to the contrary, it is undisputed that the Executive Secretary did not conduct the required review to determine whether the requested extension was justified. The Executive Secretary's failure to follow the procedures prescribed by regulation is grounds for finding that the extension of SPC's AO beyond the 18-month review period was unjustified, requiring a remand to the DAQ to conduct the required review. See D.B. v. Div. of Occupational & Prof. Licensing, 779 P.2d 1145, 1148-49 (remanding decision to the agency because the agency had "engaged in an unlawful procedure or decision-making process, or [had] failed to follow prescribed procedure").

In addition, the DAQ administers and implements a State Implementation Plan (SIP)-approved air quality permitting program under the federal Clean Air Act. Accordingly, DAQ cannot adopt rules that are less stringent than the Clean Air Act requires. The federal regulations describing SIP requirements provide that "[a]ll State plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects" as the federal definitions. 40 C.F.R. § 51.166(b) (emphasis added). Among the definitions which cannot be less stringent in a SIP is the definition of "federally enforceable" – "all limitations and conditions which are enforceable by the Administrator, including … any permit requirements established pursuant to 40 CFR 52.21 …." 40 C.F.R. § 51.166(b)(17). Consequently, permit requirements established under 40 C.F.R. 52.21,

including the automatic expiration provision in 40 C.F.R. § 52.21(r)(2), may not be less stringent than the corresponding federal regulation.

Federal Clean Air Act regulations since at least 1975 have provided that a permit to construct a source "shall become invalid if construction if not commenced within 18 months after receipt of such approval," unless an extension is expressly granted on a showing that an extension is justified. 40 C.F.R. § 52.21(r)(2). Apparently acknowledging that the Utah air quality regulation provision regarding the 18-month review process violated the overarching federal regulation in 40 C.F.R. § 52.21(r)(2), which federal courts have interpreted to be an automatic expiration of a permit, unless an extension is affirmatively granted,[1] the Board revised the Utah regulation in March 2006 to expressly incorporate the federal standard. However, while the less-restrictive, and therefore invalid, version of Utah Admin. Code R307-401-18 was in place, the federal regulation continued to bind DAQ and SPC in their consideration of the 18-month review period, even before the Board incorporated the federal regulation in Utah Admin. Code R307-405-19(1). The AO expressly acknowledges SPC's obligation to comply with this applicable federal regulation in its condition that "[t]his AO in no way releases the owner or operator from any liability for compliance with all other applicable federal, state, and local regulations including R307." Exhibit 1 to Sierra Club Summary Judgment Brief at 12, AR SPC 2542. DAQ (and SPC) acknowledged the obligation to comply with federal Clean Air Act regulations by including this provision in the AO. Because the less-restrictive, discretionary review provision in Utah Admin. Code R307-401-18 cannot

[1] Grand Canyon Trust v. Tucson Elec. Power Co., 391 F.3d 979, 981 & 982 n.1 (9th Cir. 2004); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1034, 1037 (1st Cir. 1982).

trump the automatic expiration provision in 40 C.F.R. § 52.21(r)(2), the federal regulation controls, and the AO expired based on SPC's failure to obtain an express approval for its AO extension. Accordingly, the Board must remand the SPC AO to DAQ and require SPC to submit a revised Notice of Intent to DAQ, based on current circumstances and conditions, to obtain approval to construct the proposed plant.

For the foregoing reasons, the Board should grant the Sierra Club's motion for leave to amend its request for agency action, and grant summary judgment on the claim in Statement of Reasons # 10.

Dated: March 26, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2007, I caused a copy of the foregoing Sierra Club's Reply in Further Support of Its Motion for Summary Judgment and in Further Support of its Motion to Amend the Request for Agency Action to be emailed to the following:

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